No. 12,975

IN THE

United States Court of Appeals

For the Ninth Circuit

LULA J. WILSON,
Appellant,

vs.

CORNING GLASS WORKS (a corporation),
Appellee.

APPELLANT'S OPENING BRIEF.

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Subject Index

Page

Statement of pleading and facts disclosing basis of jurisdiction of the United States Court of Appeals 1

Statement of the case 2

Specification of errors 4

Argument 5

A. Summary of argument 5

B. The Honorable District Court abused its discretion in denying appellant a jury trial 6

C. Application of Rule 38(d) of the F.R.C.P. to deny a jury trial to a party in a common law civil action because of inadvertence and oversight but without conscious, intentional waiver or prejudice to the court or adverse party violates the Seventh Amendment to the United States Constitution 11

(1) Insofar as Rule 38(d) purports to define a "waiver" of trial by jury lacking intentional and voluntary relinquishment of the right, it is contrary to the Seventh Amendment 11

(2) Federal decisions considering the "waiver" provision of Rule 38 in removal cases 17

(3) The purported "waiver" defined by Rule 38(d) is a misnomer as it lacks the recognized factors essential to constitute a waiver 20

(4) Appellant did not waive her right to jury by appearance at the trial after denial of her motion for jury 23

(5) The District Court erred in denying appellant's motion for jury trial 24

D. The District Court erred in denying appellant's motion for a new trial 25

Table of Authorities Cited

Cases	Pages
Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 81 L. ed. 1177	15
Armond v. Chicago B. & Q. R. Co., 7 F.R.D. 678	19
Baltimore & C. Line v. Redman, 295 U.S. 654, 79 L. ed. 1636	15
Baylis v. Travelers' Ins. Co., 113 U.S. 316, 28 L. ed. 989	13
Container Co. v. Carpenter Container Corp., 9 F.R.D. 261	18, 19
Dimick v. Scheidt, 293 U.S. 474, 79 L. ed. 603	15
Duignan v. U. S., 274 U.S. 195, 71 L. ed. 996	12, 23
Ferris v. Farnsworth Television & Radio Corp., 8 F.R.D. 489	18, 19
Foch Estates, Inc. v. McDonald, 1 F.R.D. 506	19
Gasoline Products Company, Inc. v. Champlin Refining Co., 283 U.S. 494, 75 L. ed. 1188	14
Glasser v. United States, 1942, 315 U.S. 60, 86 L. ed. 680	22
Gruskin v. New York Life Ins. Co., 1 F.R.D. 22	19
Hardy v. North Butte Mining Co., 22 F. (2d) 62	23, 24
Hodges v. Easton, 106 U.S. 408, 27 L. ed. 169	13, 15, 20
Johnson v. Zerbst, 304 U.S. 456, 82 L. ed. 1461	21
Kearney v. Case, 79 U.S. 275, 20 L. ed. 395	12
Kelley v. Milan, 21 F. 842, affirmed 127 U.S. 139, 32 L. ed. 77	9, 12
Kelsey v. Forsyth, 21 How. 85, 16 L. ed. 32	12
Michener v. Johnston, C.C.A. 9th, 144 F. (2d) 171	21
Munkacsy v. Warner Bros. Pictures, Inc., 2 F.R.D. 380	19
Pacific States Corporation v. Hall, 166 F. (2d) 668	20
Paper Stylists, Inc. v. Fitchbury Paper Co., 9 F.R.D. 4	18
Plack v. Baumer, 1 F.R.D. 136	19
Slocum v. New York L. Ins. Co., 222 U.S. 364, 57 L. ed. 879	22
Smith v. Weeks, 53 Fed. 758	12
Sofarelli Bros. v. Elgin, C.C.A. 4th, 129 F. (2d) 785	18

Pages

Walker v. New Mexico and S. P. R. Co., 165 U.S. 593, 41 L. ed. 837 ..... 14, 17

Wardrep v. New York Life Ins. Co., 1 F.R.D. 175 19

Constitutions

United States Constitution, Seventh Amendment 4, 6, 11

Statutes

Code of Civil Procedure, Section 631 9

28 U.S.C.A., Sections 1291 and 1294(1) 2

28 U.S.C.A., Section 1292 24

28 U.S.C.A., Section 1332(a)(1) 2

28 U.S.C.A., Section 2072 ..... 5, 9, 12, 15, 16

28 U.S.C.A., Section 2072, par. 4 16

Rules

Federal Rules of Civil Procedure:

Rule 38 ..... 5, 6, 8, 9, 10, 17

Rule 38(a) 6, 11, 15, 16

Rule 38(b) 5, 16, 17, 18, 19, 20

Rule 38(c) 17

Rule 38(d) 5, 6, 10, 11, 16, 19, 20, 24, 25

Rule 39(b) 5, 6, 10, 11, 16, 17, 18, 23

Notes on Advisory Committee on Rules following Rule 38 in 28 U.S.C.A. Rules 17 to 51, page 353 16

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Appellee.

APPELLANT'S OPENING BRIEF.

STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS OF JURISDICTION OF THE UNITED STATES COURT OF APPEALS.

The action was originally filed by appellant August 4, 1949, in the Superior Court of the State of California, in and for the City and County of San Francisco. (Tr. 4.) On August 18, 1949, appellee filed its petition for removal to the United States District Court for the Northern District of California, Southern Division. (Tr. 14.) Appellant filed her notice of motion to remand the cause to the state court August 30, 1949 (Tr. 17), and affidavit in opposition to this motion was filed by appellee September 7, 1949 (Tr. 22), whereupon the motion to remand was dropped without hearing. The basis for removal by appellee

was diversity of residence of the parties, appellee being incorporated under the laws of the State of New York and appellant being a resident of the State of California. (Tr. 4.)

The action is a simple tort action wherein appellant seeks $101,000.00 damages for personal injuries caused by the sudden breakage of a glass dish alleged to be negligently manufactured by appellee. (Tr. 7-11.)

The basis of the jurisdiction in the United States District Court is found in 28 U.S.C.A. Section 1332(a)(1); the basis of jurisdiction in the United States Court of Appeals is found in 28 U.S.C.A. Sections 1291 and 1294(1).

STATEMENT OF THE CASE.

Appellant brought action against appellee in the state court on August 4, 1949, and served appellee with summons and complaint the same day. No answer was filed within the ten days allowed by state law, but plaintiff by stipulation extended defendant's time to plead. (Tr. 20.) Four days after time to answer would have expired but for the stipulation, defendant on August 18 petitioned for removal to the United States District Court. (Tr. 18.) Plaintiff countered with a motion in the federal court to remand filed August 30. (Tr. 18.) Opposition to this motion was filed by defendant on September 7 (Tr. 22), and plaintiff's motion to remand was dropped without hearing.

The answer was served and filed in the United States District Court August 25, 1949 (Tr. 17), and the ten days' time permitted by the federal rules for demanding a jury expired September 4, 1949. This was before defendant filed its opposition to plaintiff's motion to remand to the state courts. On September 26, 1949, the Clerk in the District Court gave notice that the matter was to be set for trial on October 3, 1949. (Tr. 23.) On September 28 plaintiff filed her motion requesting trial by jury, noticing the same for October 3, 1949, at which time the matter was to be set for trial, and basing said motion upon the affidavit of J. Edward Johnson. (Tr. 24.) No counter-affidavit was filed by appellee.

The motion for trial by jury was heard orally by Judge Michael J. Roche on October 3, 1949 (Tr. 61-65), and was continued to October 10, 1949, at which time further argument was heard, the motion was denied, and the matter set for hearing without a jury. (Tr. 65-69.)

The cause was heard by the late Judge Herbert W. Erskine January 24 to 27, 1950, and final judgment for defendant entered November 16, 1950. (Tr. 55.) Judge Erskine thereafter died and motion for new trial was denied by Judge Michael Roche on April 20, 1951. (Tr. 60.) Notice of appeal was filed May 4, 1951. (Tr. 60.)

Plaintiff's cause of action was for serious injuries to her right forearm and wrist, severing certain arteries, tendons and nerves and causing permanent deformity and injury from which she still suffers.

(Tr. 8-9.) The injury was caused by the explosion of a new pyrex dish which appellant alleges was negligently manufactured by defendant. (Tr. 10-11.) No equitable issues whatsoever are involved.

This appeal is directed solely to the point that plaintiff was deprived of a trial before a jury, to which she is entitled under the laws of the United States. Basically her position is two-fold:

(1) That the honorable trial court abused its discretion in denying her a jury under the circumstances of this case, and

(2) That if the Federal Rules of Civil Procedure permit the trial judge to deny a jury to plaintiff under the undisputed facts of the instant case, then such rules are contrary to the Seventh Amendment of the United States Constitution.

SPECIFICATION OF ERRORS.

Appellant hereby specifies the following errors upon which she relies in the appeal herein:

1. The trial court abused its discretion and erred in denying to appellant a jury trial for damages for injuries caused by alleged negligence of defendant in manufacturing a pyrex glass dish, there being no equitable issues involved. Appellant's inadvertent delay in demanding a jury was of short duration and without any intention to waive her constitutional right to a jury trial. There was no prejudice to the court or to the adverse party by the short delay. The court

therefore abused its discretion in denying appellant's pre-trial motion for relief pursuant to Rule 39(b), Federal Rules of Civil Procedure.

2. The trial court erred in applying Rule 38, Federal Rules of Civil Procedure so as to deny to appellant a jury trial. If Rule 38, subdivisions (b) and (d) permits a trial judge to deny a party a jury trial under the facts of the instant case, then said subdivisions are repugnant to the Seventh Amendment to the Constitution of the United States, and to the limitations in the Act of Congress whereby the rules were authorized. (28 U.S.C.A. Sec. 2072.)

3. The trial court erred in denying appellant's motion for new trial herein upon the grounds stated in specifications of error numbered 1 and 2 supra.

ARGUMENT.

A. SUMMARY OF ARGUMENT.

In the argument we will discuss in subdivision B the questions of abuse of discretion by the trial court in denying to appellant a jury trial; and in subdivision C the constitutional question regarding the validity of the federal rules as applied to the facts of this case so as to deprive appellant of the right to a jury to hear her claim for damages for personal injuries, the action being clearly legal in nature and no equitable issues being involved.

We will contend in subdivision B that the court in failing to give relief under Rule 39(b) abused its

discretion. Rule 39(b) has no purpose other than to insure justice for litigants who unfortunately fail to comply with the strict requirements of Rule 38. The instant case is typical of those for which Rule 39(b) was framed in order to carry out the policy enunciated by Rule 38(a).

In subdivision C we will discuss the question of constitutionality of Rule 38 if it be interpreted to authorize the deprivation of a jury to plaintiff in an action historically at law with no true waiver (as opposed to the so-called "waiver" defined by Rule 38(d)) on the part of appellant of her right to jury. Plaintiff submits that when there is no actual, intentional waiver by words or conduct and no prejudice to the court or adverse party, the application of a rule fixing an *artificial* "waiver" so as to deprive a litigant of the right to a jury is a violation both of the spirit and the letter of the Seventh Amendment.

B. THE HONORABLE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING APPELLANT A JURY TRIAL.

The facts pertinent to the ruling of the trial court denying plaintiff's motion for a trial by jury are contained in the affidavit of J. Edward Johnson (Tr. 24) and are unchallenged. Defendant filed no answering affidavit. Briefly these facts are:

Plaintiff brought a common law action for damages in the proper state court, it being her desire and expectation from the first time she discussed the matter with counsel that the case should be tried before a

jury as provided by constitutional law. Affiant, at that time the attorney having actual management of the cause, inadvertently neglected to ask for a jury within the time allowed by the Federal Rules of Civil Procedure, he then being of the view that the federal court would have no alternative but to remand to the state court, and he thereby inadvertently had in mind the rule of the state court permitting a party to request a jury trial when filing the memorandum to set for trial or when the cause is set for trial.

Corroborating and supplementing the affidavit, the record shows that the complaint was filed in the state court August 4, 1949 (Tr. 3-4), was admitted to be an action of civil nature at law (Par. II, defendant's petition for removal, Tr. 4), and was removed by defendant to the federal court August 18, 1949 (Tr. 14) by which date time to answer would have expired had not plaintiff extended time by stipulation (Tr. 20); that defendant's answer was filed August 25, 1949, the last day of the extension granted defendant by plaintiff (Tr. 17); that plaintiff thereafter moved to remand the cause to the state court (Tr. 18); that defendant filed opposition to plaintiff's motion to remand on September 7, 1949, after plaintiff's time to demand jury under the federal rules had already expired (Tr. 22); and that nothing transpired in the action for 3½ weeks thereafter until plaintiff filed her motion requesting jury trial September 28, 1949 (Tr. 23-24) except that the clerk of the district court gave notice two days earlier that the cause would come on for setting October 3, 1949. (Tr. 23.)

Plaintiff submits that of importance on the question of abuse of discretion is the fact that this is a removal case, the complaint having been filed by appellant in the proper state court, and the cause being removed *by the defendant* to the federal court. Remand proceedings were still pending when the time to demand jury under Rule 38 F.R.C.P. expired. Nothing further was done by either party until appellant moved for a jury prior to setting for trial. There was therefore no prejudice to appellee due to the delay in making demand.

The fact that defendant removed the cause to the federal court is important for the reason that with such proceedings pending the chances are increased that plaintiff will fall into the trap of an artificial waiver. This was forcefully brought to the attention of all who attended the panel discussion on federal practice at the recent annual meeting of the State Bar of California. At the outset the audience was warned against the serious threat of loss of jury through inadvertence, the panel member discussing the subject stating that some reputable attorneys had even instituted the practice of demanding a jury in their complaints in actions filed in the *state* court if it were even theoretically possible that the actions might later be removed to the federal court. Such elaborate precautions to guarantee preservation of a fundamental right are in themselves a commentary on the unreasonableness of the rules making them necessary.

In the state court plaintiffs commonly demand the jury in the memorandum to set the cause for trial,

and may do so as of right, as late as the time the cause is set on the trial calendar. (California Code of Civil Procedure, Sec. 631.) Until the adoption of the Federal Rules the federal courts followed a similar rule, the jury being waived only by written stipulation, oral stipulation in open court, actual attendance on the trial without objection to lack of jury, or similar conduct clearly showing *intent* to waive the right to jury. (See 28 U.S.C.A., former Sec. 773; *Kelly v. Milan,* 21 F. 842, 854, affirmed 127 U.S. 139, 32 L. ed. 77.) All former laws in conflict with the new rules were declared of no further force and effect (28 U.S.C.A. Sec. 2072, former Sec. 723 b.) The rule was accordingly changed drastically by adoption of the Federal Rules of Civil Procedure, as Rule 38 purported to decree an artificial "waiver", "by rule", if no jury were demanded within ten days after filing of the last pleading directed to an issue. This rule as applied here reversed the burden of showing waiver (the former rule presuming *no* waiver unless contrary intent appeared) in providing for an *irrebuttable* presumption of waiver unless demand be made within the short period stated. Moreover, with the pendency of removal proceedings together with the drastic shortening of time in the federal court as compared to the state rule, it increased the possibility of "waiving", "by rule", the right to a jury trial without any actual intention of doing so.

Thus, when defendant here filed an opposition to plaintiff's motion to remand, the time for demanding a jury had already expired. In other words, by the

time it became clear that the cause would remain in the federal court, the time for demand had gone, although plaintiff would still have had ample time to demand a jury in the state court had remand been ordered.

Apparently it was evident even to the framers of the federal rules that their Rule 38 (completely aside from the constitutional question which they evidently considered solved by their novel definition of "waiver") was very strong medicine and that some provision would be necessary in the interest of justice to provide relief in the cases where an artificial waiver would by definition of Rule 38(d) arise, when in fact no actual waiver really was intended. Rule 39(b) was obviously framed for the sole purpose of providing relief in such cases. It was naturally directed to the discretion of the court since the line between an inadvertent delay barely long enough to technically violate Rule 38 and unaccompanied by any actual intention to waive a jury trial on the one hand, and conduct indicating a clearly intentional and conscious waiver on the other hand (which would deprive litigant of a jury even under the old federal decisions), is obscure, difficult to define, and necessarily dependent upon the many factors peculiar to each individual situation.

Here, though, the evidence is unchallenged and uncontradicted that plaintiff was diverted by other proceedings when her time expired, that the question of jury was not called to her attention after removal until

plaintiff herself moved for it, that no action was taken by the adverse party or by the court in reliance upon plaintiff's failure to make timely demand *and that she did not consciously or intentionally waive her right to a jury trial.*

What, then, was there for the discretion of the court to here consider? Merely the bare technical failure to make demand in the short time allowed. With nothing further to consider, and no prejudice to the court or the adverse party, we submit that the spirit of Rules 38a and 39(b) was ignored and plaintiff's right to a jury was arbitrarily taken from her, even assuming the validity of the rule under the constitution.

C. APPLICATION OF RULE 38(d) OF THE F.R.C.P. TO DENY A JURY TRIAL TO A PARTY IN A COMMON LAW CIVIL ACTION BECAUSE OF INADVERTENCE AND OVERSIGHT BUT WITHOUT CONSCIOUS, INTENTIONAL WAIVER OR PREJUDICE TO THE COURT OR ADVERSE PARTY VIOLATES THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

(1) Insofar as Rule 38(d) purports to define a "waiver" of trial by jury lacking intentional and voluntary relinquishment of the right, it is contrary to the Seventh Amendment.

The Seventh Amendment provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

In order to fully appreciate the changes whereby under the case at bar it has become possible for a party to be deprived of this constitutional right through mere inadvertence, a brief examination of the historical background of the law is necessary.

Prior to the adoption of the Federal Rules of Civil Procedure, it was long accepted that a litigant in a historically common law action was entitled to a jury as of right unless he "waived" it either by written stipulation (28 U.S.C.A., former Sec. 723(b)) or by conduct unequivocally indicating an *actual intent* to waive the jury. (*Kelly v. Milan,* 21 Fed. 842, 855; *Smith v. Weeks,* 53 Fed. 758, 762.) Conduct so constituting a waiver consisted of such actions as presence at the trial without demand for jury (*Kearney v. Case,* 79 U.S. 275, 20 L. ed. 395; *Duignan v. U. S.,* 274 U.S. 195, 71 L. ed. 996); entering into a contract which provided that in the event of litigation a jury trial was waived (idem); and in a case where "the parties agreed to waive a trial by jury." (*Kelsey v. Forsyth,* 21 How. 85, 16 L. ed. 32.)

Implicit in all "waivers" of the jury, however, was conduct giving evidence of *voluntary* relinquishment thereof. The Supreme Court would indulge no presumption that the fundamental right was waived. The right could be lost by inaction only when so prolonged that voluntary intent to waive was the only inference to be gathered therefrom. Thus the court in *Kearney v. Case,* supra, cautioned:

> "Is this court at liberty to infer from the entry a waiver of the right to a jury trial? When we con-

sider the cases already cited, in which such a waiver has been implied, and that the right to have a jury when a party demands it, is so universally known and respected, we think that it is almost a necessary inference, where a party is present by counsel and goes to trial before the court without objection or exception, he has *voluntarily waived his right to a jury,* and must be held in this court to the legal consequences of such a waiver. *Phillips v. Preston,* 5 How. 290. *But we are not prepared to go further.*

"If the state of the pleadings presents issues of fact to be tried, and there is nothing to show that the party complaining of the error was present by himself or counsel at the trial, and no jury was called, we think it is error for the court to try those issues without a jury, *because there can be no presumption that the party has waived his legal and constitutional right to have a jury.*" (Emphasis supplied.)

Far from presuming a waiver, the Supreme Court specifically declared in *Baylis v. Travelers' Ins. Co.,* 113 U.S. 316, 320, 28 L. ed. 989, 990, that "This constitutional right this court has always guarded with jealousy."

In other decisions the court likewise reiterated its view. Thus the court in *Hodges v. Easton,* 106 U.S. 408, 412, 27 L. ed. 169, 171, said:

"It was the province of the jury to pass upon the issues of fact, and it was the right of the defendants, secured by the Constitution of the United States, to have them do so. That right could have been waived, *but it could not be taken from them*

> *by the court.* * * * It has been often said by this court that the trial by jury is a fundamental guaranty of the rights and liberties of the people. Consequently, *every presumption should be indulged against its waiver.*" (Emphasis supplied.)

The Supreme Court has also noted that the right to jury is a fundamental *substantial right,* not one of *procedure,* and not to be "directly or indirectly" taken by the court from the jury. *Walker v. New Mexico and S. P. R. Co.,* 165 U.S. 593, 596, 41 L. ed. 837, 841:

> "The 7th Amendment, indeed, does not attempt to regulate matters of pleadings or practice, or to determine in what way issues shall be framed by which questions of fact are to be submitted to a jury. Its aim is not to preserve mere matters of form and procedure, *but substance of right.* This requires that questions of fact in common law actions shall be settled *by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative.*" (Emphasis supplied.)

Gasoline Products Company, Inc. v. Champlin Refining Co., 283 U.S. 494, 498, 75 L. Ed. 1188, 1190:

> "But we are not now concerned with the form of the ancient rule.
>
> "It is the constitution which we are to interpret; and *the constitution is concerned, not with form, but with substance.* All of vital significance in trial by jury is that issues of fact be submitted for determination with such instructions and guidance by the court as will afford opportunity

> for that consideration by the jury which was secured by the rules governing trials at common law. * * * Beyond this, the 7th amendment does not exact the retention of old forms of procedure". (Emphasis supplied.)

The right to a jury in a historically common law action thus appears to be inviolate, unless consciously, intentionally, voluntarily *waived* by the party and in the words of the Supreme Court in *Hodges v. Easton,* supra, is "secured by the constitution of the United States." (See also in addition to cases above cited, *Aetna Ins. Co. v. Kennedy,* 301 U.S. 389, 81 L. Ed. 1177, 1180, *Dimick v. Schiedt,* 293 U.S. 474, 79 L. Ed. 603, *Baltimore & C. Line v. Redman,* 295 U.S. 654, 79 L. ed. 1636.)

What, then could be more firmly established than the existence and character of the *fundamental right* to jury? But note what followed:

The Supreme Court was authorized by Congress to prescribe rules for *practice and procedure* in the district courts of the United States, *provided: "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury* as at common law and as declared by the Seventh Amendment to the Constitution." (28 U.S.C.A. Sec. 2072.)

The Supreme Court accordingly prescribed the Federal Rules of Civil Procedure, Rule 38(a) thereof reading: "The right of trial by jury as declared by the Seventh Amendment to the Constitution and

as given by a statute of the United States shall be preserved to the parties inviolate."

Notwithstanding the above rule, the old statute providing for waiver by written stipulation (28 U.S.C.A. former Sec. 723(b)), being diametrically opposed to the new rule, was considered repealed pursuant to 28 U.S.C.A. Section 2072, par. 4. (See Notes of Advisory Committee on Rules following Rule 38 in 28 U.S.C.A. Rules 17 to 51, page 353, and compare former Section 723(b) to present Rule 38(b) and (d).)

Having given lip service to constitutional guarantee by Rule 38, subsection (a), the *procedural* rule makers went on in subsections (b) and (d) to emasculate this right of substance by providing as follows:

> "(b) *Demand.* Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party."
>
> "(d) *Waiver.* The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) *constitutes a waiver by him of a trial by jury.* A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties." (Emphasis supplied.)

In these innocent appearing so-called *"procedural"* provisions, and particularly in the words emphasized,

not only was the burden shifted, as though a presumption existed in *favor* of waiver, but the *substantive* right to a jury trial was abridged and modified. It then followed that certain district courts hereinafter noted interpreted these provisions as instructing them "directly or indirectly to take from the jury" to themselves the determination of questions of fact (contrary to *Walker v. New Mexico & S. P. R. Co.,* supra) whenever a technical violation of the rule occurred, regardless of whether there was an actual intent to waive this right of *substance.*

With the rule so worded and so applied, does the rule "abridge" or "modify" a substantive right?

Here, plaintiff submits, is how this rule has *abridged* and *modified* the substantive right to a trial by jury: The rule does not leave the question of whether there was an actual waiver to the trial judge. Instead, whenever there is a failure to comply with the technical provisions of the rule, the rule defines this to be a waiver, *regardless of intention,* then gives to the trial judge *discretion* to grant or not grant a jury trial.

(2) Federal decisions considering the "waiver" provision of Rule 38 in removal cases.

Rather than comparing subparagraph (a) with (b) and (c) and noting the inconsistency and the constitutional infringement, the district courts nevertheless usually granted relief from a failure to comply with the strict provisions of Rule 38(b) and (c) under Rule 39(b) which provides as follows:

> "(b) *By the Court.* Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues."

This has been especially true in removal cases where time elapsed before complete orientation to the changed procedures was accomplished. We have found only one Circuit Court of Appeals opinion concerning a removal case (*Sofarelli Bros. v. Elgin,* C.C.A. 4th, 129 F. (2d) 785, jury granted despite "waiver"), and no Supreme Court cases considering the matter. The district courts did not consider the constitutionality of the provisions involved, each assuming the "waiver" to be valid and contenting itself with citing Rule 38(b); nor did the above Circuit Court of Appeals, in view of its disposition of the cause, have occasion to do so. Thus the matter of constitutionality of these provisions as applied in this case is here one of first impression in the federal courts.

An examination of the ten discovered removal cases in which the above rules were considered is revealing. In six of them relief from the "waiver" was granted under Rule 39(b). (*Sofarelli Bros. v. Elgin,* supra; *Container Co. v. Carpenter Container Corp.,* 9 F.R.D. 261; *Paper Stylists, Inc. v. Fitchburg Paper Co.,* 9 F.R.D. 4; *Ferris v. Farnsworth Television & Radio Corp.,* 8 F.R.D. 489; *Wardrep*

v. New York Life Ins. Co., 1 F.R.D. 175; *Gruskin v. New York Life Ins Co.,* 1 F.R.D. 22.) These cases found a "waiver" solely on the authority of Rule 38(d), but even so there are indications in some that an intent to waive is necessary even for a Rule 38(d) "waiver". (See particularly *Container Co. v. Carpenter Container Corp.* and *Ferris v. Farnsworth Television & Radio Corp.,* supra.) Such intent is, of course, an essential ingredient to waiver, as will be developed infra.

Examination of the four removal cases found in which relief was *not* granted is equally revealing, all involving factual situations from which an *actual* waiver (i.e., conscious, voluntary relinquishment of a known right) might be inferred. Four to nine months elapsed after the time under Rule 38(b) had expired before relief was sought by the litigant in any of these cases. (*Foch Estates, Inc. v. McDonald,* 1 F.R.D. 506, four months; *Armond v. Chicago B. & Q. R. Co.,* 7 F.R.D. 678, no demand ever filed; *Plack v. Baumer,* 1 F.R.D. 136, nine months; *Munkacsy v. Warner Bros. Pictures, Inc.,* 2 F.R.D. 380, four months.)

Further, in *Foch Estates, Inc. v. McDonald* and *Arnold v. Chicago B. & Q. R. Co.,* supra, no attempt whatsoever was made to explain the reason for delay, leaving it to conjecture whether it was inadvertent or by design, and *Plack v. Baumer,* supra, presented "complicated contentions" which the court in its discretion thought better tried by a court than a jury. The inadvertent failure to demand a jury was fully

explained in the case at bar, the trial proved to be of a typical personal injury action, with no complications other than those encountered and solved by juries daily, and the demand was made only 3½ weeks late.

In short, the instant case is the only removal case we have found where a jury was denied where it affirmatively appeared on the record that no intent to waive ever existed, and no failure for a period of four or more months to demand jury occurred (such as would support an inference that a waiver was actually intended).

(3) The purported "waiver" defined by Rule 38 (d) is a misnomer as it lacks the recognized factors essential to constitute a waiver.

Let us compare the "waiver" defined by Rule 38(d) with a true waiver of the constitutional right to jury as found in decisions of the Supreme Court and this circuit.

As pointed out in *Hodges v. Easton,* supra, "that right could have been waived, but could not be taken from them by the court", and "every reasonable presumption should be indulged against its waiver". We do not argue that the right could not be waived by appellant, but rather that it was not here waived despite the declaration of Rule 38(d) that failure to demand pursuant to Rule 38(b) constituted "waiver".

This Court gave a concise summary of the essentials of a waiver in *Pacific States Corporation v. Hall,* 166 F. (2d) 668, 671, in the following words:

"At any rate, waiver consists of a *voluntary* and *intentional* relinquishment of a known right; and to prove a case of implied waiver of a legal right, as appellees here attempt to do, there must be a clear, unequivocal and decisive act of the creditor showing a purpose to abandon or waive the legal right, or acts amounting to an estoppel on his part." (Emphasis supplied.)

Accordingly, whether a litigant waives his constitutional right is a matter to be determined from all the circumstances of the case, and not by an inelastic ten-day rule of thumb.

Johnson v. Zerbst, 304 U.S. 456, 464, 82 L. Ed. 1461, 1466:

"It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to Counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."

See, also:

Michener v. Johnston, C.C.A. 9th, 144 F. (2d) 171.

The reluctance of the Supreme Court to find a waiver of fundamental rights has been reaffirmed since the promulgation of the rules:

Glasser v. United States, 1942, 315 U.S. 60, 69, 86 L. Ed. 680, 699:

"The guarantees of the Bill of Rights are the protecting bulwarks against the reach of arbitrary power. * * * To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights. *Aetna Ins. Co. v. Kennedy,* 301 U.S. 389, 81 L. ed. 1177, 57 S. Ct. 809; *Ohio Bell Telph. Co. v. Public Utilities Commission,* 301 U.S. 292, 81 L. ed. 1093, 57 S. Ct. 724."

(The court will note that although the *Glasser* case was a criminal action and involved the constitutional right to counsel, the cases cited therein are civil in nature, the *Aetna* case cited involving the right to jury in a civil action.)

It should also be noted that the Supreme Court recognizes that the substance of a right is sometimes attempted to be taken away by indirect means and has forbidden any such tampering with the right to a jury in the guise of a permissible procedural change.

Slocum v. New York L. Ins. Co., 222 U.S. 364, 57 L. Ed. 879, 888:

"It is obvious that if such a verdict can be supported here, when the very act of the court in doing this is excepted to and relied on as error, the trial by jury will be preserved in name, but will be destroyed in its essential value, and becomes nothing but the machinery through which the court exercises the functions of a jury without its responsibility."

(4) Appellant did not waive her right to jury by appearance at the trial after denial of her motion for jury.

Appellee, in the trial court, contended that despite appellant's motion for jury under Rule 39(b) made prior to setting, she nevertheless waived her right to jury by appearing at the trial without further demand therefor, citing *Duignan v. U. S.*, 274 U.S. 195, 71 L. Ed. 996. The designation by appellee of many portions of the record irrelevant to this appeal can lead only to a belief that it intends to renew this argument here despite its lack of merit. The *Duignan* case involved an equity action in which a jury was first requested at the time of trial in an advisory capacity, not as a matter of right. Other cases, cited infra, answer appellee's contention.

The only delay in demanding jury here was a 3½ week delay prior to the setting of the cause for trial, as is discussed supra. However, appellant's motion was denied and the cause was assigned to the late Judge Herbert W. Erskine to be heard without jury. (Tr. 69-70.) Appellee contended in the lower court on plaintiff's motion for new trial that plaintiff should have *renewed* her motion before trial in order to obtain, in effect, a reversal by the judge who presided at the trial of the order previously made by the judge who ruled on the motion. The district court is *one court* and it is not the province of one judge of the court to review the rulings of another judge. (*Hardy v. North Butte Mining Co.*, 22 F. (2d) 62.) The only procedure for review by a court of its own previous rulings is on motion for new trial. Motion

for new trial was made herein on the error herein urged and was denied.

As the order denying jury was made prior to final judgment, no appeal therefrom was authorized by 28 U.S.C.A. Section 1292. As stated above, the proper and orderly remedy was motion for new trial or appeal from the judgment, review being thereby obtained of all interlocutory orders and appeals from which no appeal has been taken. "Shopping around" among the judges of the same court until a favorable decision is obtained contrary to that of the judge originally ruling on the matter would be distinctly improper and would impair the orderly function of the courts. (*Hardy v. North Butte Mining Co.,* 22 F. (2d) 62, and cases cited.) When appellant's motion for jury was denied, she had no alternative but to go to trial. Her record on the motion had been made and her rights fully preserved.

(5) The District Court erred in denying appellant's motion for jury trial.

It becomes clear, from the examination of the foregoing authorities, that Rule 38(d) has gone too far. The Supreme Court had repeatedly ruled that a litigant was entitled to a jury unless he waived his right, so Rule 38(d) provided a "waiver" unique in the law, a "waiver" under rule by reason of inadvertence as it were. Although bearing the name "waiver" it is hardly the procedure mentioned in the foregoing cases as justifying the deprivation of the constitutional right. Can a fundamental right "secured by

the Constitution of the United States", "always guarded with jealousy", against waiver of which "every presumption should be indulged", and which "could have been waived, but * * * could not be taken from them by the court", be overcome by rules of procedure defining waiver to be something less than its well settled meaning under Supreme Court decisions?

Appellant here never at any time *waived* her right to jury by either word or deed, nor was appellee prejudiced by the short delay in demanding it. The court erred in denying appellant's motion for jury, and judgment should therefore be reversed and trial by jury ordered.

D. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL.

Appellant on November 17, 1950, made timely motion for new trial. Judge Erskine having passed away prior to argument, however, the motion was heard and denied by Judge Roche.

The foregoing argument and authorities concerning abuse of discretion and the constitutionality of Rule 38(d) as applied to the facts of this action are equally applicable here. The honorable district court was given full opportunity to correct its error but did not do so. In refusing to grant appellant a new trial by jury the district court repeated its pretrial error and disregarded the long line of cases cited by ap-

pellant wherein the Supreme Court clearly stated that waiver of jury cannot be presumed, nor can it be taken from a litigant by the court unless waived. The court failed to give relief despite the clear and uncontradicted record that no waiver of jury in fact ever here took place. The order after trial refusing appellant's motion for new trial should therefore be reversed.

Dated, San Francisco, California,
September 5, 1951.

Respectfully submitted,
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